

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Joint Petition for Rulemaking to Resolve)	RM-10865
Various Outstanding Issues Concerning the)	
Implementation of the Communications)	
Assistance for Law Enforcement Act)	

**REPLY COMMENTS OF
VONAGE HOLDINGS CORP.**

I. INTRODUCTION

Vonage Holdings Corp. (“Vonage”), by undersigned counsel, submits these reply comments concerning the Joint Petition for Expedited Rulemaking (“Joint Petition”) filed by the U.S. Department of Justice, the Federal Bureau of Investigation (“FBI”), and the Drug Enforcement Administration (collectively, “Law Enforcement”).¹

II. VONAGE SUPPORTS LAW ENFORCEMENT’S EFFORTS

Vonage shares the Joint Petitioners’ concern that law enforcement agencies continue to have access to information that assists them in combating criminals, terrorists and spies. As detailed in the Joint Petition, the Communications Assistance for Law Enforcement Act (“CALEA”) was passed by Congress to maintain the ability of law enforcement agencies to conduct lawful electronic surveillance. Vonage notes that, without exception, the Company has complied with all subpoena requests from law enforcement agencies, including providing call logs, records, and other account information irrespective of any CALEA-imposed obligations.

¹ A detailed description of Vonage’s service can be found in the Company’s Petition for a Declaratory Ruling. *See* Petition for Declaratory Ruling, *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211 (filed Sept. 22, 2003).

Vonage has met directly with the FBI and is engaged in coordinating technical discussions with the agency to ensure that the Company can continue to provide information that law enforcement requires. Vonage recognizes that lawfully intercepting calls and other data that traverses broadband networks raises important issues that require examination by the Federal Communications Commission (“Commission”).

Vonage is committed to assisting and enabling law enforcement agencies in protecting the citizenry of the United States and will continue to do so regardless of the outcome of this proceeding. Even if the Commission should determine that CALEA is inapplicable to broadband applications, such as Vonage’s, the Company is nevertheless committed to working cooperatively with law enforcement to develop modes and means for timely delivery of lawfully requested information. Indeed, as noted by the Joint Petitioners, “CALEA did not provide law enforcement with any additional surveillance authority.”² Accordingly, this proceeding is not about whether companies like Vonage have an obligation to respond to the law enforcement’s lawful request for information—they do; instead, the question facing the Commission is whether the scope of the CALEA statute as drafted by Congress includes technologies that have proliferated since passage of CALEA over ten years ago.

III. THE PARTIES FUNDAMENTALLY DISAGREE ON THE SCOPE OF CALEA

The parties submitting comments in this proceeding fundamentally disagree as to the extent of CALEA obligations. Some parties supporting the application of CALEA to broadband networks and broadband applications argue that since the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (“Telecommunications Act”), contains a definition of “telecommunications carrier” that is distinct from the same term in CALEA,

² See Joint Petition for Expedited Rulemaking of the U.S. Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration in RM-10865, 3 (filed Mar. 10, 2004) (“Joint Petition”).

Congress intended for CALEA to apply to services beyond those captured by the definition of “telecommunications carrier” in the Telecommunications Act. Accordingly, these parties suggest that CALEA obligations could be found to apply to services that are characterized as “information services” under the Telecommunications Act, including certain forms of Voice over Internet Protocol (“VoIP”) communications and push-to-talk wireless services.³

Conversely, parties filing comments in opposition to the Joint Petition argue that the Commission has already determined that the definition of “telecommunications carrier” is identical for purposes of both the Telecommunications Act and CALEA.⁴ Many parties further argue that the legislative history makes clear that CALEA was not intended to apply to either broadband applications or broadband networks.⁵ Additionally, some parties argue that expanding CALEA in the manner suggested by the Joint Petitioners would exceed the

³ See, e.g., National District Attorneys Assoc. Comments, at 1 (“CALEA was intended to cover push-to-talk, VoIP and other packet mode services.”); New York Office of the Attorney General Comments, at 12-13 (“[I]t would be entirely proper to find that a service is a telecommunications service under CALEA but not under the [Telecommunications Act].”); Verizon Companies Comments at 2 (arguing that VoIP and broadband access services fall within the scope of CALEA); Verizon Wireless at 1-2 (commenting that CALEA applies to push-to-talk wireless services); Warinner, Gesinger & Associates at 2 (stating that VoIP providers meet the definition of “telecommunications carrier” under CALEA).

⁴ See, e.g., AT&T Corp. Comments, at 9, 11-16 (arguing that the term “telecommunications carrier” is identical under the Telecommunications Act and CALEA); Center for Democracy and Technology Comments, at 8 (maintaining that the meaning of “telecommunications carrier” is substantially the same under both statutes); Covad Communications Comments, at 8-9 (emphasizing that the FCC has found that the term “telecommunications carrier” is expect to apply to the same entities in “virtually all cases”); Information Technology Industry Council Comments, at 5-6 (stating that the definition of “telecommunications carrier” under the two statutes are not distinct).

⁵ See, e.g., AT&T Corp. Comments, at 17-18 (highlighting that the legislative history demonstrates that CALEA does not apply to information services); Center for Democracy and Technology, at 5-7 (arguing that Congress did not intend to include “information services” within CALEA); Earthlink Comments, at 12-16 (maintaining that extending CALEA to “information services” would be contrary to Congress’s intent); Electronic Frontier Foundation (advocating that Congress did not intend for CALEA to apply to “information services”); Electronic Privacy Information Center, at 3 (stating that the legislative history makes clear that CALEA was not intended to apply to “information services”); Information Technology Council Comments, at 7-9, 11-13 (providing that the legislative history clearly provides that CALEA was not meant to apply to “information services”); Leap Wireless International, Inc. (stating that legislative history makes clear that CALEA does not apply to certain “information services”).

Commission's jurisdiction and that Law Enforcement must appeal to Congress in order to obtain the relief requested in the Joint Petition.⁶

IV. CONGRESS IS ADDRESSING CALEA-RELATED CONCERNS

As the Commission is aware, federal legislation concerning the application of CALEA to VoIP communications services has already been introduced in Congress. Representative Chip Pickering and Senator John Sununu separately introduced VoIP legislation in the House and Senate.⁷ Representative Pickering's bill would require VoIP providers to ensure that their equipment, facilities, or services are capable of: (1) enabling the government to intercept VoIP transmissions and corresponding call-identifying information; and (2) delivering to law enforcement VoIP transmissions and corresponding call-identifying information to the same extent as telecommunications carriers under CALEA. The bill also would require the Commission to determine, within 180 days after the Act's enactment, and every 180 days thereafter, whether it is technologically feasible for VoIP providers to comply with these law enforcement provisions. Upon such a finding of technical feasibility, the Commission would develop regulations within 180 days to implement the law enforcement provisions. Senator Sununu's legislation would require VoIP providers to provide a level of access to law enforcement not less than that provided to law enforcement by information service providers. Vonage endorses Congressional efforts to address these important issues and supports the efforts

⁶ See, e.g., AT&T Corp. Comments, at 20-22 (stating that interpreting CALEA as proposed by Joint Petitioners would violate the statutory scheme); BellSouth Corporation, at 2 (arguing that interpreting statutes as proposed by Law Enforcement would exceed limits of statute); Center for Democracy and Technology, at 28-30 (maintaining that Joint Petitioners are really seeking to rewrite CALEA but need to go to Congress to accomplish this goal); Conference America, at 2 (emphasizing that a legislative solution is needed); Electronic Privacy Information Center, at 1, 4-6 (highlighting that Law Enforcement's remedy is with Congress, not the FCC); Internet Commerce Coalition, at 3 (finding that only Congress has the authority to extend CALEA to information service providers).

⁷ See S. 2281, the VoIP Regulatory Freedom Act of 2004 (Senator John E. Sununu (R-NH)); H.R. 4129, the VoIP Regulatory Freedom Act of 2004 (Representative Charles Pickering (R-MS)).

of legislators to clarify the statute in a manner that will address the legitimate needs of Law Enforcement.

V. NOTHING IN THIS CALEA PROCEEDING ALTERS THE ANALYSIS OF WHETHER A SERVICE IS AN INFORMATION SERVICE OR TELECOMMUNICATIONS SERVICE UNDER TITLE II OF THE COMMUNICATIONS ACT

As addressed in Section III, *supra*, a number of parties and the Joint Petitioners⁸ have argued the scope of CALEA may be broader in coverage than Title II of the Telecommunications Act. Regardless of this Commission's determination of what services are subject to CALEA, nothing in CALEA can alter or modify the classification of services under Title II of the Telecommunications Act. Indeed, the Joint Petitioners argue that there are important differences between the definitions of "telecommunications carrier" under CALEA and the Telecommunications Act.⁹

Vonage's service, for example, has been classified as an "information service" under the Telecommunications Act by the Federal District Court for the District of Minnesota.¹⁰ For over twenty years, the Commission has applied different regulatory regimes depending on whether a service was classified as "telecommunications" or "information." The Telecommunications Act codified these distinctions. While the scope of CALEA may remain an issue in this proceeding, the classification and characterization of services under Title II is not.

VI. IT IS IN THE PUBLIC INTEREST TO EXPLORE WHAT INFORMATION LAW ENFORCEMENT IS NOW UNABLE TO OBTAIN TO PERFORM ITS FUNCTION

If this Commission is to further the interests of Law Enforcement as well as to assist in the protection of Homeland Security, it is imperative that it obtain specifics about what information Law Enforcement is currently unable to obtain from applications providers or network operators.

⁸ See Joint Petition, 5-15.

⁹ See Joint Petition, 9-11.

¹⁰ See *Vonage v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp.2d 993, 999 (D.Minn. 2003), *reh'g denied*, 2004 WL 114983.

In Vonage's experience, it has never been in a position where it was unable to provide law enforcement with requested information. Many other parties submitting comments in this proceeding also maintain that they have provided law enforcement with the information requested by law enforcement.¹¹ Accordingly it is important for this Commission, network operators, application service providers, and ultimately Congress to understand what, if any risks to Homeland Security now exist and whether this Commission, Industry, or perhaps Congress, have an appropriate roll in mitigating any such issues. In this regard, the Commission should seek specific detailed technical information from Law Enforcement and, if appropriate, hold closed meetings as well as open forums as it as done on E911 and Disability Access. Should this Commission find that Law Enforcement is otherwise impaired without Congress broadening the scope of CALEA— such information will be extraordinarily helpful to both Industry and Congress as they develop technical and legislative solutions in furtherance of this Nation's Homeland Security goals.

VII. CONCLUSION

Vonage urges the Commission to proceed cautiously in considering the important issues raised by the Joint Petitioners. Vonage supports the efforts of all law enforcement agencies to protect the Homeland and is committed to working with such agencies regardless of the outcome of this proceeding. As noted by these comments, Vonage and other companies are obligated, under other statutes, to assist law enforcement efforts and CALEA does not provide law enforcement with additional subpoena powers. Vonage highlights that there is fundamental disagreement among the parties submitting comments in this proceeding as to the extent of CALEA obligations, with some parties arguing that CALEA can be interpreted to apply to both

¹¹ See, e.g., AT&T Corp. Comments, at 2; Covad Communications Comments, at 3; Leap Wireless International, Inc., at 7; WorldCom, Inc. Comments, at 3.

broadband services and broadband applications, while others emphasizing that such an interpretation is not possible.

Vonage submits that Congress is already aware of the importance of addressing CALEA-related issues that arise in the context of broadband applications and broadband networks and has introduced legislation to resolve these issues. Should the Commission determine that CALEA can be interpreted to apply to broadband applications, it is critical that the Commission note that the applicability of CALEA to a service does not otherwise subject that service to Title II regulation. The distinction under the Telecommunications Act between telecommunications and information services remain independent of CALEA considerations. Finally, Vonage urges the Commission to examine whether there is information needed by law enforcement agencies that is not currently provided that would be available if CALEA-obligations were imposed. The importance of this information is of significance to Industry, Congress and service providers.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "WB Wilhelm, Jr.", with a stylized flourish at the end.

William B. Wilhelm, Jr.
Ronald W. Del Sesto, Jr.

Attorneys for Vonage Holdings Corp.

April 27, 2004

9140428v1